**Preserving the Ark of Our Safety: How a Stronger Administrative Approach Could Save Section 5 of the Voting Rights Act**

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INTRODUCTION

“In our system, the first right and most vital of all our rights is the right to vote. Jefferson described the elective franchise as ‘the ark of our safety.’ It is from the exercise of this right that the guarantee of all our other rights flows.”\(^1\) In keeping with this, on July 27, 2006, President George W. Bush signed into law the Voting Rights Act Reauthorization and Amendments Act of 2006.\(^2\) The twenty-five year extension of the Voting Rights Act of 1965\(^3\) (VRA) included the controversial yet undeniably successful Section 5.\(^4\) Section 5 requires that covered jurisdictions apply for and receive approval, or preclearance, from the United States Attorney General or the United States District Court for the District of Columbia before making any voting-related changes.\(^5\) It has been extremely effective at preventing barriers to minority participation in the political process. Despite this, the current system, where the Department of Justice is confined to a specific set of covered jurisdictions and relatively static procedures, lacks the adaptability necessary to be fully effective at combatting voting discrimination in an ever-changing society.


\(^5\) See § 1973c(a); 24 CFR § 51.10 (2010).
Section 5 covers any state or political subdivision that, for the presidential election of 1964, 1968, or 1972, (1) used any “test or device”\(^6\) and (2) had voter registration or voter turnout of below fifty percent.\(^7\) Despite appeals by some to update the data used in the coverage formula in the 2006 reauthorization, Congress instead chose to retain 1964, 1968, and 1972 as the

\(^6\) See § 1973b(c) (defining this phrase). Congress concluded that the use of tests and devices, such as literacy tests and proof of “understanding of constitutional provisions . . . or good moral character, as a prerequisite to voting” were often used to discriminate against minorities and deny them the right to vote. H.R. Rep. No. 89-439, at 11–12 (1965). In *South Carolina v. Katzenbach* the Supreme Court accepted this as a basis for Section 5 coverage concluding that “Tests and devices are relevant to voting discrimination because of their long history as a tool for perpetrating the evil.” 383 U.S. 301, 330 (1966). Examples of this include requiring that African-Americans “interpret obscure sections of state constitutions” or answer questions such as “how many bubbles does a bar of soap contain” as a prerequisite for voter registration. Abigail Thernstrom, *Section 5 of the Voting Rights Act: By Now, a Murky Mess*, 5 GEO. J.L. & PUB. POL’Y 41, 44 (2007); see Brian K. Landsberg, *Free at Last to Vote* 18 (2007) (noting that in response to the concern “that black voters would begin to have a voice in Alabama politics,” the Alabama Democratic Party sponsored, and successfully adopted, the Boswell Amendment in 1946, which “required that an applicant be able to ‘understand and explain any article of the constitution of the United States’”)

\(^7\) See § 1973b(b); see H.R. Rep. No. 89-439, at 13–14 (1965) (providing evidence and arguments that the presence of these two factors indicates the “strong probability” that the tests or devices are beings used to discriminate against minorities); see also 28 C.F.R. § 51 Appendix (2010) (listing the currently covered jurisdictions).
baseline years. This failure to alter the coverage formula has created a diverse school of criticism. It has also fueled continuing concerns over the constitutionality of Section 5. The constitutional future of Section 5 and the protection that it affords has never been less certain.

While some argue that the blatantly prevalent racism that once existed in the covered jurisdictions is not longer present, Professor Cashing concludes that as long as “pronounced racial cleavages remain evident in party affiliation” there will be a significant risk of voting

8 See, e.g., S. REP. NO. 109-295, at 25–36 (2006) (additional views of Senators John Cornyn and Tom Coburn) (providing data showing significant improvement in African-American voter registration and turnout in the covered jurisdictions and arguing that the “systematic, invidious practices that plagued our election system 40 years ago” no longer exist and, thus, an alternative or updated coverage formula should have been considered); Roger Clegg & Linda Chavez, An Analysis of the Reauthorized Sections 5 and 203 of the Voting Rights Act of 1965: Bad Policy and Unconstitutional, 5 GEO. J.L. & PUB. POL’Y 561, 581 (2007) (concluding that the coverage formula no longer has “any rhyme or reason” and that it must be updated so that the coverage reflects the current state of the country); Carol M. Swain, Reauthorization of the Voting Rights Act: How Politics and Symbolism Failed America, 5 GEO. J.L. & PUB. POL’Y 29 (2007) (asserting that Congressional failure to update the coverage of Section 5 missed an opportunity to extend protection to areas that truly need it and continued coverage for some jurisdictions where the situation no longer requires it or where there was no history of discrimination to begin with).

9 See Nw. Austin Mun. Util. Dist. No. One v. Holder (NAMUDNO), 129 S. Ct. 2504, 2512 (2009) (recognizing Section 5’s federalism costs and asserting, in dicta, that if voting discrimination is no longer concentrated in the covered jurisdictions, Section 5’s application may not be “sufficiently related to the problem that it targets” and may be unconstitutional).
discrimination. Considered by many to be the single most effective and important tool in the battle for civil rights, the overturning of Section 5 would be a monumental blow to the civil rights movement.

Since the VRA was first passed in 1965, the Supreme Court has upheld the constitutionality of Section 5 on numerous occasions. In so doing, the Court acknowledged the


11 Accord Lois Fuentes-Rohwer, *Legislative Findings, Congressional Powers, and the Future of the Voting Rights Act*, 82 IND. L.J. 99, 102 (2007); Heather K. Gerken, *A Third Way for the Voting Rights Act: Section 5 and the Opt-In Approach*, 106 COLUM. L. REV. 708, 709 (2006) (describing Section 5 as the “most powerful weapon in the civil rights arsenal”). Section 5 directly confronted the serious problems of case-be-case adjudication, including the fact that once one practice was deemed illegal “local officials would [simply] switch to another.” Id. at 711. It thus solved the difficulties surround the enforcement of the right to vote by effectively prevented new discriminatory voting practices from ever being enacted or enforced. See Id.

12 See, e.g., *Lopez v. Monterey Cnty.*, 525 U.S. 266, 282–84 (1999) (recognizing the federalism costs of Section 5 but holding that the Fifteenth Amendment permits intrusion into “areas traditionally reserved to the States” and thus ruling that the VRA was a permissible exercise of Congressional authority); *South Carolina v. Katzenbach*, 383 U.S. 301 (1966). In *Katzenbach*, the Court recognized the enduring problem of voter discrimination, the ineffectiveness of past methods of enforcement, and the fact that discrimination was concentrated in certain areas of the country, and thus ruled that Section 5 was a “permissible method of dealing with the problem” of voting discrimination. Id. at 328–29.
constitutional questionability of Section 5 but stated that “exceptional conditions” and “unique circumstances” may “justify legislative measures not otherwise appropriate.”¹³ The debate over the current state of Section 5’s constitutional standing thus focuses on whether those conditions and circumstances that justified Section 5 in the past, or their modern day equivalent, still exist. When answering this question, it is important to consider which standard of review the Supreme Court will use to determine the constitutionality of Section 5,¹⁴ and whether, under that standard, the legislative record is sufficient to justify the need for Section 5’s prophylactic approach to voting discrimination.

This Comment will argue that a stronger administrative approach, one that includes regulatory power to adjust the coverage and procedures of Section 5, can help ensure the

¹³ Katzenbach, 383 U.S. at 334–35 (1966) (holding that the fact that the covered states’ were continuously developing and enacting new discriminatory rules with the clear purpose of evading unfavorable court rulings were “unique circumstances” and Section 5 was a reasonable response by Congress); see also NAMUDNO, 129 S. Ct. at 2510 (stating that past decisions upheld the VRA since “circumstances continued to justify the provisions”); id. at 2525–26 (Thomas, J., dissenting) (arguing that the discrimination that justified the previous decisions upholding Section 5 no longer exists).

¹⁴ See, e.g., Katzenback, 383 U.S. at 324 (finding Section 5 constitutional by applying the rational means test). But see City of Boerne v. Flores, 521 U.S. 507, 520 (1997) (ruling that statutes passed by Congress under § 5 of the Fourteenth Amendment will be reviewed using the “congruence and proportionality” test); Clegg & Chavez, supra note 8, at 569–70 (predicting that the Supreme Court will review Congress’s Fifteenth Amendment enforcement authority under the “congruence and proportionality” test outlined in City of Boerne).
continued constitutionality of Section 5 by better tailoring it to changing demographics and evolving needs. This would directly confront the concern of the Supreme Court that the current coverage may not be “sufficiently related to the problem that it targets” by allowing coverage to be continuously adapted to the areas where problems exist.\textsuperscript{15} This Comment will also argue that an agency with rulemaking power to adjust both the procedures and coverage of Section 5 will be far more effective at combating modern-day voting discrimination on a national scale. Finally, this Comment will argue that greater transparency in the preclearance process, along with specific reporting requirements and avenues to appeal grants of preclearance, will help reduce the risk of political abuse.

Part I of this Comment gives an overview of Section 5, the effect it has had on the covered jurisdictions, and the role of the Justice Department. Part II examines the current constitutional standing of Section 5. Finally, Part III proposes that Congress modify the VRA to give the Department of Justice regulatory power to modify certain aspects of Section 5, strengthen the reporting requirement for preclearance decisions, and allow for appeal of certain grants of preclearance. This Comment is in no way meant to assert that Section 5, in its current form, is ineffective or unnecessary. It simply attempts to suggest reforms that would greatly strengthen the effectiveness and constitutional strength of Section 5’s protection now and into the future.

I. OVERVIEW

Congress passed the VRA in an attempt to remedy what it called the “painfully slow” progress in enforcement of the Fifteenth Amendment\textsuperscript{16} and the voting rights statutes in effect at

\textsuperscript{15} NAMUDNO, 129 S. Ct. at 2512.

\textsuperscript{16} U.S. CONST. amend. XV (stating that the right to vote cannot be denied on the basis of race).
The slow progress was attributed to the “intransigence of State and local officials” and to the prolonged and costly judicial process of a case-by-case enforcement approach. While the VRA has other important provisions, this Comment specifically deals with Section 5.

A. Section 5


18 Id. at 9–10 (stating that trial preparation for a voting rights case filed by the Justice Department involves an enormous amount of time and often, since new discriminatory schemes are being continuously developed, causes “no change in result, only in method”).

19 There are other vitally important provisions of the VRA. Section 2 represents the statutory embodiment of the Fifteenth Amendment’s right to vote. It bans any voting practice or procedure “which results in a denial or abridgement of the right of any citizen . . . to vote on account of race or color. 42 U.S.C. § 1973(a) (2006). Section 4 contains the opt-out provision and its specific requirements, see id. § 1973b(a), the coverage formula, see id. § 1973b(b), and the statutory definition of test and device used in the coverage formula. See id. § 1973b(c), (f)(3).

Section 10 unequivocally bans the use of “poll taxes” as a prerequisite to the right to vote. See id. § 1973h. Finally, Section 203 requires that any jurisdiction where more than 5% or 10,000 citizens are “members of a single language minority and are limited-English proficient” must offer bilingual voting material. Id. § 1973aa-1a.
Section 5 was included in the VRA as one of its temporary provisions.20 It was subsequently reauthorized and amended in 1970,21 1975,22 1982,23 and most recently, in 2006 it was extended for an additional 25 years.24 While technically temporary, Section 5 represented the central provision of Congress’s solution to the ineffective and costly case-by-case adjudication of the continuously evolving methods of voting discrimination.25 Section 5 accomplishes this by automatically requiring examination of any proposed change to the voting practices in a covered jurisdiction and shifting the burden to the jurisdiction to prove that the change “neither has the purpose nor will have the effect of denying or abridging the right to vote

20 Technically the expiring provision is Section 4(a)(8), codified in 42 U.S.C. § 1973b(a)(8), and applies only to Section 4, but since Section 5’s coverage is specified in Section 4, the expiration of Section 4 would impliedly mean the end of Section 5. In addition to Section 4 and Section 5, the other temporary provision is Section 203, codified in 42 U.S.C. § 1973aa-1a.


25 See J. Morgan Kousser, The Strange, Ironic Career of Section 5 of the Voting Rights Act, 1965–2007, 86 Tex. L. Rev. 667, 680 (recognizing that Section 5 was the remedy to the ineffective case-by-case approach to voter discrimination). Congress recognized that in addition to the fact that a case-by-case approach was both slow and costly, it also often “caused no change in result, only in method,” as offenders would simply devise a new means by which to discriminate. H.R. Rep. No. 89-439, at 10 (1965).
on account of race.”

This means that covered jurisdictions are barred from enforcing any changes to voting practices without first meeting this burden of proof in the eyes of either the U.S. Attorney General or, alternatively, the U.S. District Court for the District of Columbia. This prophylactic approach to voting discrimination was unique and innovative, but given the prior success of certain states at thwarting Congress’s attempts to enforce the guarantees of the Fifteenth Amendment, perhaps it was exactly what was needed.

1. The Justice Department and the Potential for Political Abuse

The role of the Department of Justice (DOJ) is both vital to the success of Section 5 and surprisingly limited. Congress greatly restricted the DOJ’s power by not granting it regulatory authority over Section 5 and its coverage. The accountability of the DOJ’s decisions were also significantly restricted by the fact that grants of preclearance are not reviewable. There is the potential for inconsistent results as personnel, or the political leanings of the Executive Branch,

26 42 U.S.C. § 1973c (2006); see Kousser, supra note 25, at 680 (asserting that the shifting of the burden of proof to the jurisdiction along with the scrutiny of every voting change was necessary to combat the innovative means of discriminating continuously implemented by the South); see also 28 C.F.R. § 51.54 (2010) (stating that a discriminatory effect will be found if the proposed voting change results in retrogression of a minority groups “opportunity to exercise the electoral franchise effectively”).


28 Kousser, supra note 25, at 683 (citing that the DOJ is restricted to the issuance of guidelines or procedures instead of “rules,” and “its objection letters [do] not have precedential force”).

29 28 C.F.R. § 51.49 (2010); see Gerken, supra note 11, at 718 (citing the increasing politicization of the DOJ as reason to allow judicial reviewability of grants of preclearance).
change. While parties can still bring suit against the precleared changes, the benefits of Section 5 are lost. This means the changes can be enforced, absent a court’s injunction, and the burden of proof is shifted away from the jurisdiction and onto the plaintiff.

Even before initial passage in 1965, some congressmen raised concerns about the “multitude of opportunities for political manipulation by an Attorney General who is inclined to do so.”30 This may very well have been the reason for the painfully slow implementation and enforcement of Section 5 after initial passage in 1965.31 Since the DOJ is an executive agency and the Attorney General is a member of the President’s cabinet, it follows that the Attorney General may be receptive to opportunities for political gain for the President’s political party.

Absent adequate safeguards, political manipulation was almost a certainty and three recent examples deserve consideration. The first deals with a 2001 redistricting proposal submitted by Mississippi. While the proposal was still pending at the DOJ, the Mississippi Republican Party convinced a federal judge to adopt a separate Republican-favored redistricting plan if the DOJ failed to grant preclearance within sixty days.32 After review, career staff unanimously found that the proposal did not negatively affect minority voters and recommended

31 See Kousser, supra note 25, at 684–85, 688 (noting the weak and inefficient early enforcement and the fact that the Justice Department did not draft any guidelines until being forced to by Congressional pressure in 1971).
that the DOJ grant preclearance.  

Political staff rejected the recommendations and extended the review past the sixty-day window, thus allowing the federal court to install the Republican-favored redistricting plan. The reasoning for the delay was suspicious and condemned as being the product of political influence.

The second case concerns Texas’s proposed 2003 redistricting plan. Since Texas is a covered state, Section 5 requires that it receive preclearance for any redistricting proposal. After submission to the DOJ, career staff members analyzed the plan and produced a unanimous memorandum concluding that Texas had failed to prove that the “redistricting plan [would] not

34 Edward M. Kennedy, Restoring the Civil Rights Division, 2 HARV. L. & POL’Y REV. 211, 219 & n.34 (2008).
35 See Liu, supra note 32, at 82–83 (“[T]he political staff rejected the recommendation [of the career staff] and instead extended the review period to seek more information from the state on whether the fact that a state court, not a state legislature, had ordered the [redistricting] plan would affect preclearance, despite no legal basis to think it would.”); Rich et al., supra note 33, at 36–37 (finding the delay “highly irregular” since the requested information would not affect the ultimate preclearance decision and that it was “perhaps unprecedented for the Division’s political staff to override a unanimous staff recommendation to preclear a submitted change”).
have a discriminatory effect.”37 Thus, they argued, preclearance should be denied.38 The Attorney General ignored the staff’s recommendations and granted preclearance six days later.39 This decision by a Republican Attorney General in support of a redistricting plan that strongly favored Republicans was roundly criticized as representing political manipulation of the preclearance process.40 Since grants of preclearance need not be explained and are not reviewable, opponents had no real recourse.

37 Memorandum from the Dep’t of Justice Voting Section on Section 5 Recommendation 66, 69 (Dec. 22, 2003), www.washingtonpost.com/wp-srv/nation/documents/texasDOJmemo.pdf (finding that the plan also has the effect of diminishing, or retrogressing, the voting strength of minorities in the state).

38 Id. at 71.

39 See Daniel P. Tokaji, If It’s Broke, Fit It: Improving Voting Rights Act Preclearance, 49 HOWARD L.J. 785, 811 (2006) (noting that the lack of transparency in the decisionmaking process makes the “reasoning behind the decision to preclear opaque,” but that some outside the process have stated their opinion that politics played a hand in the outcome).

40 See Kennedy, supra note 34, at 219–20 (noting that it was publically admitted by those responsible for the redistricting plan that the sole purpose was to increase the political strength of Republicans in Texas); Mark Posner, Evidence of Political Manipulation at the Justice Department: How Tom Delay’s Redistricting Plan Avoided Voting Rights Act Disapproval, (Dec. 6, 2005) available at http://writ.news.findlaw.com/commentary/20051206_posner.html (stating that in the past, both Democratic and Republican administrations have almost never overridden the recommendations of career staff members, and that the decision to preclear the redistricting plan was a marked deviation from that practice). But see Edward Blum et al., Who’s Playing
The third controversy surrounds a 2005 Georgia law requiring that voters show government-issued photo identification before voting. After analysis, career staff at the DOJ recommended that preclearance be denied concluding that it would have a discriminatory effect. They cited the fact that a drastically disproportionate number of African-Americans compared to whites lacked the requisite identification. Preclearance was granted the day after the memorandum was issued. This was also criticized as being the product of political abuse.

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41 See Tokaji, supra note 39, at 815 (noting that the DOJ staff memo, using Department of Transportation statistics, found the following: fourteen percent of Georgia voters did not have a drivers license; African-Americans were four to five times more likely to not have access to a car; and the cost of procuring a photo ID would have a greater impact on those in poverty, a disproportionate number of who are black); cf. Mark A. Posner, The Politicization of Justice Department Decisionmaking Under Section 5 of the Voting Rights Act: Is it a Problem and What Should Congress Do?, AM. CONST. SOC’Y FOR L. POL’Y, 14 (Jan. 2006), http://www.acslaw.org/files/Section%205%20decisionmaking%201-30-06.pdf (advancing that photo-ID requirements “erect barriers to voting” that have a disparate impact on minority voters).

42 See Tokaji, supra note 39, at 816–17 (suggesting the appearance of political motivation in granting preclearance apparently without even considering the prepared memorandum of the career staff); Posner, supra note 41, at 15 (noting that, despite a longstanding practice, the memo was not even sent to the Assistant Attorney General before preclearance was granted).
The Georgia law was subsequently challenged in federal court where a judge issued a preliminary injunction citing the severe restrictions the law imposed on the right to vote. While leaving open the question of the law’s standing under the VRA, the court tellingly noted that “the Photo ID requirement [was] most likely to prevent Georgia’s elderly, poor, and African-American voters from voting.” Additionally, while the rationale of the law was to prevent voter fraud, it made absentee voting easier. This was, in the eyes of Cathy Cox, Georgia’s Secretary of State, completely contradictory when considering that absentee voting is far more

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43 See Kennedy, supra note 34, at 220 (observing that, of the investigation team, those who had recommended denying preclearance were reprimanded while the lone supporter of preclearance was financially rewarded); Posner, supra note 41, at 14–15 (concluding that the lack of consideration given the recommendations of the career staff raises “questions about the Justice Department’s commitment to nonpolitical decisionmaking); see also Dan Eggan, Staff Opinions Banned in Voting Rights Cases, WASH. POST, Dec. 10, 2005, http://www.washingtonpost.com/wp-dyn/content/article/2005/12/09/AR2005120901894.html (discussing a new Justice Department policy of excluding the recommendations of staff members from preclearance decisions).


45 Id.

46 David H. Harris, Jr., Georgia Photo ID Requirement: Proof Positive of the Need to Extend Section 5, 28 N.C. CENT. L.J. 172, 185 (2006) (noting that under the new law, any voter could receive an absentee ballot without the need to provide any proof of identification).
likely to be a medium of fraud than in-person voting. Further, whites are significantly more likely to vote absentee than African-Americans. Subsequently, Georgia abandoned the law and amended it with a new statute in 2006. These examples of potential political abuse of Section 5 preclearance beg for some reform to better ensure the protection of the system.

2. The Effects of Section 5

Section 5 has been tremendously successful. Since passage in 1965, the covered jurisdictions have experienced massive gains in voter registration and turnout among minorities. Corresponding with these increases in registration and turnout are enormous increases in the number of minority elected officials. In 1965, there were roughly 300 African-American elected officials nationally compared to over 9,100 in 2006, almost 47% of who hold

47 Common Cause/Georgia, 406 F. Supp. 2d at 1332–33 (citing a statement by Secretary Cox in which she noted that in the nine preceding years, there had not been a “single case or complaint of a voter impersonating another voter at the polls,” while during the same period there had been consistent cases of fraud involving absentee voting).

48 Id. at 1353 (citing statistics from the 2004 elections showing that 12% of white women compared to 7% of African-American women voted absentee, and 11% of white men compared to 6% of African-American men voted absentee).

49 Harris, Jr., supra note 46, at 188.

50 See S. REP. 109-295, at 11 (2006). Voter registration for African-Americans in all the covered states was over 50% in 2004 with seven states boasting rates higher than the national average of 64.3%. Id. There are also some extreme examples of improvement, such as Mississippi’s increase from a registration rate of 6.4% in 1965 to a registration rate of 76.1% in 2004, and Alabama’s increase from a rate of 18.5% in 1965 to a rate of 72.9% in 2006. Id.
office in the covered jurisdictions. While these numbers alone may not show the entire picture, they suggest a transformation of the political system in the covered jurisdictions into something more in line with the ideals of the Fifteenth Amendment and the morals of a just society.

II. THE DEBATE ON SECTION 5’S CONSTITUTIONALITY

A. Why It Was Constitutional

When Congress passed the VRA in 1965, it did so under § 2 of the Fifteenth Amendment stating that the VRA was “appropriate legislation” to enforce the prohibitions of the Fifteenth Amendment. Almost immediately the constitutionality of some key sections, including Section 5 and the coverage formula in Section 4(b), were challenged in South Carolina v. Katzenbach. While South Carolina asserted multiple objections to provisions of the VRA, the core question before the Court became “Has Congress exercised its powers under the Fifteenth Amendment in

51 See id. at 12 (noting that there are also roughly 6,000 Latino public officials); Charles S. Bullock, III and Ronald Keith Gaddie, Good Intentions and Bad Social Science Meet in the Renewal of the Voting Rights Act, 5 GEO. J.L. & PUB. POL’Y 1, 7 (2007).

52 See U.S. CONST. amend. XV, § 2 (granting Congress the authority to enforce the Fifteenth Amendment through “appropriate legislation”); see also H.R. REP. NO. 89-439, at 17–19 (1965) (arguing that given the situation of “persistent racial discrimination,” the VRA is “appropriate legislation” to enforce the right to vote). But see id. at 73–76 (views of Representative Tuck) (stating that the coverage formula of the VRA is “arbitrary and indiscriminate” and that the Act is a “flagrant violation of the Constitution”).

an appropriate manner with relation to the States?"54 Declaring the standard of review, the Supreme Court stated, “As against the reserved powers of the States, Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting.”55 The reasonable and vitally important logical implication is that the Fifteenth Amendment, and

54 Id. at 323–24. The Court dismissed the challenges that the coverage formula was a violation of due process, “constitutes a forbidden bill of attainder,” and infringes on the principle of separation of powers, ruling that these protections were only available to “individual persons and private groups” and were thus not applicable to States. See id.

55 Id. at 324 (reaching this standard based on the fact that the Constitution supersedes state law, explicitly grants Congress power to enforce the right to vote “by appropriate legislation,” and prior precedent has granted Congress “full remedial powers to effectuate the constitutional prohibition against racial discrimination in voting”). The Court quoted precedent concerning Congress’s power under the Civil War Amendments:

Whatever legislation is appropriate, that is, adapted to carry out the objects the amendments have in view, whatever tends to enforce submission to the prohibitions they contain, and to secure to all persons the enjoyment of perfect equality and the equal protection of the laws against State denial or invasion, if not prohibited, is brought within the domain of congressional power.

Id. at 327 (quoting Ex parte Virginia, 100 U.S. 339, 345–46 (1880)).
“appropriate legislation” passed in its enforcement, supersedes the constitutional rights of the States.\(^{56}\)

In its analysis, the Supreme Court recognized that Section 5 may be an “uncommon exercise of congressional power,” but stated that the question of whether the legislation is appropriate is dependent on the conditions and circumstances facing Congress.\(^{57}\) The Supreme Court acknowledged that case-by-case litigation had been ineffective at dealing with voting discrimination noting, for emphasis, a suit in Dallas County that lasted over four years.\(^{58}\) The Court then turned to the coverage formula and found that Congress had reliable information that most of the covered jurisdictions had engaged in voting discrimination.\(^{59}\) Upholding Section 5, the Court found two key aspects: first, that Congress knew of the persistence and creativity of the methods of voting discrimination; and second, that Congress had reason to believe that the covered “States might try similar maneuvers in the future in order to evade the remedies” of the

\(^{56}\) See id. at 325 (recognizing that “the Fifteenth Amendment supersedes contrary exertions of state power” and that Congress is granted express authority to enforce the guarantees of the Amendment).

\(^{57}\) See id. at 334–35.

\(^{58}\) See id. at 314–15 (noting that at the end of the four years, black registration in Dallas County was only 383 of about 15,000 voting age African-Americans, indicating almost no improvement in voting equality as a result of the litigation). The Court noted that Congress viewed this as an example of the “ineffectiveness of existing legislations” and a clear indication of the need for new means of enforcing the constitutional rights of the Fifteenth Amendment. Id.

\(^{59}\) See id. at 329–30 (requiring nothing more than “reliable evidence” of voting discrimination and a coverage formula that is “relevant to the problem” to hold that coverage is constitutional).
VRA.\textsuperscript{60} Given these “exceptional conditions” and “unique circumstances,” the Court found that the VRA, including Section 5, was appropriate legislation under § 2 of the Fifteenth Amendment.\textsuperscript{61}

The Court dismissed the contention by South Carolina that there was not evidence of voting discrimination in \textit{all} of the covered jurisdictions, finding instead that the formula “was relevant to the problem of voting discrimination,” and thus Congress could “infer a significant danger of the evil in [those] few remaining” covered jurisdictions.\textsuperscript{62} The Court thus indicated that it would not require evidence of discrimination in every political subdivision that was brought under Section 5 coverage.

\textbf{B. Why It Still Is Constitutional}

The question of the present constitutionality of Section 5 is the subject of vigorous legal discussion. While this is a debate that has continued from the initial enactment of the VRA and Section 5, the ever-increasing age of the coverage formula and the clear advancements in racial equality have only served to add fuel to the fire. The dicta of the 2009 Supreme Court decision \textit{Northwest Austin Municipal Utility District Number One v. Holder (NAMUDNO)}\textsuperscript{63} greatly increased the possibility of the Supreme Court overturning Section 5 in its current form.

1. Concerns About The Coverage Formula

\footnotesize\begin{itemize}
\item \textsuperscript{60} \textit{Id.} at 335.
\item \textsuperscript{61} \textit{Id.}
\item \textsuperscript{62} \textit{Id.} at 329.
\item \textsuperscript{63} 129 S. Ct. 2504 (2009).
\end{itemize}
The central issue in the debate on Section 5’s constitutionality is the coverage formula. Congress explicitly set this formula in the VRA and the DOJ has no authority to modify it.\(^6\) Despite calls by some prominent legal scholars to update the coverage of Section 5 in the 2006 reauthorization act, Congress chose not to amend the formula.\(^5\) This means that the coverage continues to be based on the state of the country in 1964, 1968, and 1972. Considering the political issues that would have been involved with any attempt to reform the coverage of Section 5, this is not surprising.\(^6\)


\(^5\) See e.g., An Introduction to the Expiring Provisions of the Voting Rights Act and Legal Issues Relating to Reauthorization: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 10, 217 (2006) (statement of Richard L. Hasen, William H. Hannon Distinguished Professor of Law, Loyola Law School) (noting the inconsistency between the data relied on and the voter turnout today and calling for a new coverage formula that better represents the location of current and future voting discrimination); Nathaniel Persily, Options and Strategies for Renewal of Section 5 of the Voting Rights Act, 49 HOWARD L.J. 717, 723–24, 727–30 (2006) (arguing that the currently covered jurisdictions may no longer represent the worst offenders of voting rights and advancing possible triggers based on patterns of legal violations or “some measure of partisan competition” within the jurisdiction).

\(^6\) See Nathaniel Persily, The Promise and Pitfalls of the New Voting Rights Act, 117 YALE L.J. 174, 210–11 (2007) (discussing political obstacles to expanding the coverage of Section 5 including that Congress was controlled by Republicans when many of the uncovered
One of the most common criticisms of the coverage formula is that the dated formula results in coverage that is increasingly both over-inclusive and under-inclusive.67 While it must be recognized that any set coverage formula will inevitably be imperfect, it must also be recognized that as the data it relies upon ages and demographics change, those imperfections will be exacerbated. With that said, Congress did amass a sizable record of evidence supporting the proposition that purposeful voting discrimination is still a significant problem in many of the covered areas.68 Since the Supreme Court has never required that Congress prove the existence of voting discrimination in all the jurisdictions that ultimately fall under coverage, it is possible that the Supreme Court may find this legislative record sufficient to justify the reauthorization of Section 5.69 Even if this is the case, the over-inclusiveness and under-inclusiveness of the jurisdictions with significant and recent alleged voting discrimination were Republican-leaning districts).

67 See 152 CONG. REC. 14,273–74 (2006) (statement of Rep. Charlie Norwood) (arguing that the VRA has resolved the offenses that it targeted in 1964 and that the coverage formula should be updated to ensure protection for all areas that need it); Thernstrom, supra note 6, at 47, 72–76 (calling the current coverage “increasingly arbitrary” as demographics shift and race relations evolve); see also supra note 8, and accompanying text.


coverage formula raises issues of effectiveness and fairness. Congress confronted the problem of over-inclusiveness with the inclusion of an opt-out provision in the 1982 reauthorization.\(^70\) While this provision is not perfect, it does provide an avenue to jurisdictions for the removal of coverage and thus guarantees that coverage is not inherently static. Congress also, to some degree, confronted the issue of under-inclusiveness in Section 3(c) by allowing a court, as part of the granted relief in a voting rights proceeding, to “retain jurisdiction for such period as it may deem appropriate” and thus essentially require the jurisdiction to seek preclearance from that court or from the Justice Department.\(^71\) This was meant to be a remedy available to courts and not necessarily a means of altering the coverage formula. Despite their usefulness, these two provisions have been used sparingly and have not had much effect on the coverage of Section 5.\(^72\)


\(^{72}\) See Nw. Austin Mun. Util. Dist. No. One v. Holder (\textit{NAMUDNO}), 129 S. Ct. 2504, 2512 (2009) (Thomas, J., dissenting) (noting that only seventeen jurisdictions have successfully bailed out of Section 5 coverage, and all were within the state of Virginia); \textit{THE NAT’L COMM’N ON THE VOTING RIGHTS ACT, PROTECTING MINORITY VOTERS: THE VOTING RIGHTS ACT AT WORK 1982-2005} 34 (2006), http://www2.ohchr.org/english/bodies/hrc/docs/ngos/lccr2.pdf (stating that Section 3(c), called the “pocket trigger,” has been used sparingly but has “served as an important deterrent to discrimination where it has been used”); cf. Jeffers v. Clinton, 740 F. Supp. 585, 600
While it seems that the over-inclusiveness of the coverage formula may potentially pose the greatest challenge to the constitutionality of Section 5, under-inclusiveness will also be an important factor. There are many examples of flagrant violations of voting rights in non-covered states. It is unclear if these represent a systematic discriminatory approach in any of the uncovered jurisdictions, thus warranting possible Section 5 coverage. What is clear is that, in an analysis of Section 5’s constitutionality, the Supreme Court will likely consider whether voting discrimination is “concentrated in the jurisdictions singled out for preclearance.” In answering this question, both the over-inclusiveness and under-inclusiveness of the coverage will be important factors. Thus, any recommended reforms that aim at strengthening the constitutionality of Section 5 must confront both of these issues.

2. Section 5 Remains a Constitutional Exercise of Congressional Power

It is important to note that the Section 5 coverage formula was created with the goal of singling out those jurisdictions with the “longest and most egregious histories of entrenched


NAMUDNO, 129 S. Ct. at 2512.
voting discrimination.”

Thus, the fact that there is evidence of voting discrimination in uncovered jurisdictions, standing alone, is not sufficient to conclude that Section 5 is not longer constitutional. To answer the question of constitutionality it must be determined whether voting discrimination, and the risk of future discrimination, still exists in covered jurisdictions at sufficient levels to justify singling them out for coverage.

The record amassed by Congress in support of the continued need for Section 5 coverage is enormous, numbering well over 10,000 pages and including numerous hearings, statements, studies, and documented instances of discrimination. It provides convincing support for the continued need for Section 5’s current coverage.

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75 Kristen Clarke, The Congressional Record Underlying the 2006 Voting Rights Act: How Much Discrimination Can the Constitution Tolerate?, 43 HARV. C.R.-C.L. L. REV. 385, 389 n.16 (noting that the coverage formula was never meant to cover all jurisdictions that engaged in voting discrimination and that other sections of the VRA provided remedies to voters in those uncovered jurisdictions).

76 See NAMUDNO, 129 S. Ct. at 2510, 2512 (2009) (recognizing that Section 5 had been upheld in the past based on a determination that “circumstances continued to justify the provision,” and questioning whether coverage still accurately represented jurisdictions with a disproportionate tendency towards racial discrimination).

77 Rep. Chabot noted that since October 2005, the Subcommittee on the Constitution alone had “held over 12 hearings, heard from 47 witnesses, and compiled over 12,000 pages on the Voting Rights Act.” 152 CONG. REC. 14,222 (2006) (statement of Rep. Chabot). Rep. Sensenbrenner called the record “one of the most extensive considerations of any piece of legislation that the
Despite the undeniable improvement in overall race relations, strong evidence still exists to support the assertion that voting discrimination is still entrenched in many of the covered jurisdictions. One source is voting discrimination lawsuits filed under Section 2 of the VRA. This can provide a means of comparison between the covered jurisdictions and uncovered jurisdictions and thus possibly add support for the assertion that those covered areas still warrant


In a statement given on the floor of the Senate in support of the 2006 VRA reauthorization, Senator Kennedy recognized the “unimaginable” amount of progress that has been made since the VRA was first passed in 1965, but went on to note:

While we have made enormous progress, it takes time to overcome the deep-seated patterns of behavior that have denied minorities full access to the ballot. Indeed, the worst thing we could do would be to allow that progress to slip away because we ended the cure too soon. We know that the act is having an impact. We know that it is deterring discrimination. And we know that despite the act, racial bloc voting and other forms of discrimination continue to tilt the playing field for minority voters and candidates. We need to ensure that jurisdictions know that the act will be in force for a sufficiently long period that they cannot simply wait for its expiration, but must eliminate discrimination root and branch.


42 U.S.C. § 1973 (2006) (prohibits any voting procedure or practice which “results in a denial or abridgement of the right . . . to vote on account of race,” applies nationally, and is a permanent provision of the VRA).
being singled out. In a comparison of 331 lawsuits involving alleged Section 2 violations since 1982, a study by the Voting Rights Initiative found that of the 123 that resulted in a successful outcome for the plaintiff, sixty-eight or about 55% of those came from covered jurisdictions. This is especially significant when considered against the reality that less than 25% of the national population resides in covered jurisdictions. This disparity is even more substantial given the fact that the covered jurisdictions have what Professor Karlan has called the added “deterrent” and “blocking” effects of Section 5. All this provides support to the assertion that

80 Katz, supra note 73, at 654–56. This also translated into a higher success rate for plaintiffs in covered jurisdictions who won 42.5% of their lawsuits compared to 32.2% for plaintiffs in uncovered jurisdictions. See id. at 656. This study only encompasses a fraction of the total number of Section 2 litigation since there are many factors such as settlement, failure to pursue a claim, or failure to publish an opinion, that make the total number unknown. See id. at 654.

81 See id. at 655. In the oral arguments for NAMUDNO before the Supreme Court, Neal Katyal, Counsel for the Department of Justice, used the percentages of successful Section 2 lawsuits and nation population living in covered jurisdictions as justification for coverage in response to Justice Kennedy’s question of whether the situation continued to justify the “differentiation between the States.” Transcript of Oral Arguments at 35, Nw. Austin Mun. Util. Dist. No. One v. Holder, 129 S. Ct. 2504 (No. 08-322), http://www.supremecourt.gov/oral_arguments/argument_transcripts/08-322.pdf.

82 Pamela S. Karlan, Section 5 Squared: Congressional Power to Extend and Amend the Voting Rights Act, 44 HOUS. L. REV. 1, 22 (2007) (describing Section 5 as have a “blocking function” by preventing the enactment of discriminatory changes through the denial of preclearance and a “deterrent function” by preventing covered jurisdictions from even attempting to make a change
voting discrimination has not been purged from the covered jurisdictions and is still present at a disproportionate level compared to the uncovered jurisdictions.

Proposed voting changes and corresponding preclearance objections also provide evidence of the continued entrenchment of racial discrimination in covered jurisdictions. In a study of DOJ preclearance objections, discriminatory intent or purpose was a legal basis for the objection in 74% of objections handed down in the 1990s.83 This indicates that intentional voter

they know will likely be denied); see LAUGHLIN MCDONALD & DANIEL LEVITAS, THE CASE FOR EXTENDING AND AMENDING THE VOTING RIGHTS ACT: VOTING RIGHTS LITIGATIONS, 1982–2006: A REPORT OF THE VOTING RIGHTS PROJECT OF THE AMERICAN CIVIL LIBERTIES UNION 4 (2006), http://www.aclu.org/files/votingrights/2005_report.pdf (stating that since 1982 there have been over 1,000 instances where the DOJ has denied preclearance for voting changes). It is important to note that preclearance objections have dropped off significantly since the mid 1990s. See Bullock III & Gaddie, supra note 51, at 18. This is due, at least in part, to the Supreme Court’s decision in Reno v. Bossier Parish School Board (Bossier Parish II) where the Court limited the purpose prong of Section 5 to prohibit only those voting changes enacted with a retrogressive purpose, and not those enacted with merely a discriminatory purpose. See Reno v. Bossier Parish Sch. Bd., 528 U.S. 320, 341 (2000). This was subsequently reversed in the 2006 reauthorization when Congress amended Section 5, stating that “The term ‘purpose’ . . . shall include any discriminatory purpose.” Voting Rights Act Reauthorization and Amendments Act of 2006, Pub. L. No. 109-246, § 5, 120 Stat. 580–81 (2006) (codified at 42 U.S.C. § 1973c(c)).

83 See Peyton McCrary et al., The End of Preclearance as We Knew It: How the Supreme Court Transformed Section 5 of the Voting Rights Act, 11 MICH. J. RACE & L. 275, 292–98 (2006) (compared to 49% of objections in the 1980s).
discrimination is still present in the covered jurisdictions. Notably, since Section 5 coverage was initiated in 1965, not one Louisiana redistricting plan, in its initially submitted form, has received preclearance.84 Louisiana is not the only jurisdiction to have its redistricting proposals denied preclearance, and if not for Section 5, these redistricting plans would have greatly reduced the voting power of minorities in those jurisdictions.85 Considering the fact that redistricting plans are often in effect for at least a decade, they can be an extremely effective means of minimizing the voting power of minorities and, in this regard, the importance of Section 5 cannot be

84 To Examine the Impact and Effectiveness of the Voting Rights Act: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 109th Cong. 16, 18 (2005) (statement of Marc Morial, President and CEO, National Urban League) (“In other words, in the last 40 years, every single State House redistricting plan adopted immediately after the Census and submitted for preclearance in Louisiana has been found, both by Republican and Democratic Attorneys General, to abridge the right to vote on account of race or color or membership in a language minority group.”).

85 In 2001, Texas proposed a redistricting plan that, despite increases in the Latino population, would have eliminated four Latino majority districts while adding only one such district. See id. at 19 (statement of Ann Marie Tallman, President and General Counsel, Mexican American Legal Defense and Education Fund). A proposed 1982 Louisiana redistricting plan would have resulted in “one majority-African-American district and 4 majority-white districts in a ward that was 61% African-American.” Voting Rights Act: Evidence of Continued Need, supra note 68, at 4532–33 (statement of Debo Adegbile, Associate Director of Litigation, NAACP Legal Defense Fund, Inc.).
overstated. It is also important to note that in addition to the many examples of attempted voting discrimination, there is an additional deterrent effect of preclearance which has likely prevented numerous discriminatory changes from ever being proposed. While Section 5 has prevented the enforcement of discriminatory practices, it has yet to cured the behavior that is the root of the problem. Since case-by-case adjudication of voting discrimination remains as ineffective as it was in 1965, and discrimination is still disproportionately present in the covered jurisdictions, “the circumstances continue to justify” Section 5. Section 5 remains a constitutional exercise of Congress’s power.

86 See Voting Rights Act: Evidence of Continued Need, supra note 68, at 4534 (statement of Debo Adegbile, Associate Director of Litigation, NAACP Legal Defense Fund, Inc.) (“Section 5’s role in ensuring that minority political opportunities do not get trampled during redistricting has protected the rights of untold numbers of minority voters.”).

87 See id. at 4529 (reasoning that jurisdictions are less likely to enact discriminatory voting changes if they know they will have to seek preclearance and thus publically explain and defend those proposed changes).


89 See, e.g., Christopher Bryant, The Pursuit of Perfection: Congressional Power to Enforce the Reconstruction Amendments, 47 Hous. L. Rev. 579, 614–15 (2010) (arguing that the Constitution, and in this case the Reconstruction Amendments, gives Congress the discretion to choose what remedies are appropriate to combat unconstitutional behavior); Clarke, supra note 75, at 432–33 (noting the substantial legislative record amassed by Congress in support of the continued need for Section 5 protections, asserting that it is similar to the records supporting past reauthorizations, and concluding that courts will continue to hold Section 5 constitutional); Mark
3. What Will The Supreme Court Do?

Since the Supreme Court’s decision will likely come down to whether the legislative findings are adequate to support the need for Section 5, the outcome implicitly becomes “a question of judicial attitudes and the Justice’s own views about the legislation under review.”

To those who support Section 5 and its continuation, the Supreme Court’s decision in NAMUDNO brought dark tidings. While technically avoiding the issue of constitutionality and instead reaching a decision based on statutory interpretation, the Court included language that

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A. Posner, *Time is Still on its Side: Why Congressional Reauthorization of Section 5 of the Voting Rights Act Represents a Congruent and Proportional Response to our Nation’s History of Discrimination in Voting*, 10 N.Y.U. J. LEGIS. & PUB. POL’Y 51, 87–105, 130–31 (2006) (providing an in-depth analysis of how the “congruence and proportionality” test applies to Section 5 and concluding that if the Court applies this standard correctly, and gives proper deference to the legislative record, it should uphold the constitutionality of Section 5).

90 Fuentes-Rohwer, *supra* note 11, at 104, 130 (concluding that the question of the constitutionality of Section 5 will also come down to “whether the Court can muster the will to strike down the most effective civil rights statute in history”); see Lous Fuentes-Rohwer, *Understanding the Paradoxical Case of the Voting Rights Act*, 36 FLA. ST. U. L. REV. 697, 701 (asserting that in the past the Court has deferred to Congress and refused to subject the VRA to serious scrutiny, thus making the future question of constitutionality simply a matter of whether the Court will continue this deference).
clearly implies that it has serious concerns about the constitutional muster of Section 5.\textsuperscript{91} One of these concerns centered on whether the coverage of Section 5 represents the “current political conditions” given the fact that the data used for the coverage formula is over thirty-five years old.\textsuperscript{92} The Court recognized Section 5’s success, but made clear that “the Act imposes current burdens and must be justified by current needs.”\textsuperscript{93} While the Court did not clarify whether it would apply the “congruence and proportionality” standard established in \textit{City of Boerne v. Flores},\textsuperscript{94} or the less-demanding “rational means” test used in \textit{South Carolina v. Katzenbach},\textsuperscript{95} it recognized “serious constitutional questions under either test.”\textsuperscript{96} Given the fact that the Court avoided the constitutional question, much of its discussion of this issue had nothing to do with the ultimate result. The NAMUDNO opinion seems to go out of its way to question the constitutional standing of Section 5 even while ultimately avoiding the issue, and this may be a not so subtly veiled warning of things to come.

\textsuperscript{91} See \textit{NAMUDNO}, 129 S. Ct. at 2516–17 (avoiding the constitutional question and instead ruling that “political subdivisions,” within the meaning of the VRA, includes the appellant and thus allows the appellant to apply for a bail-out from coverage).

\textsuperscript{92} \textit{Id.} at 2512.

\textsuperscript{93} \textit{Id.}

\textsuperscript{94} 521 U.S. 507, 520 (1997) (“There must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end.”).

\textsuperscript{95} 383 U.S. 301, 324 (1966) (“As against the reserved powers of the States, Congress may use any rational means to effectuate the constitutional prohibition of racial discrimination in voting.”).

\textsuperscript{96} \textit{NAMUDNO}, 129 S. Ct. at 2513.
Any defense of the constitutionality of Section 5 must center on its current need and thus the legislative record compiled during its passage. To justify the continued separation of those covered areas, Congress must show not only that voting rights violations continue to exist, but also that some “systematic differences exist between the currently covered and non-covered jurisdictions.”

In his testimony to Congress, Professor Pildes stressed that modern day voter discrimination, which often involves vote dilution instead of outright violence, is different from the issues for which the VRA was originally created to target and is no longer “concentrated in any one discrete part of the country.” Also important to the debate is the undeniable success of Section 5. This success has, in many cases, prevented discriminatory actions by covered jurisdictions from ever going into effect, either through deterrence or denial of preclearance, and has thus further diminished the evidence of purposeful discrimination in covered areas. These factors have helped lead some to seriously question whether Section 5 will pass the Supreme Court’s test of constitutionality.

97 The Continuing Need For Section 5 Pre-Clearance: Hearing Before the S. Comm. on the Judiciary, 109th Cong. 201 (2006) (statement of Professor Richard H. Pildes, Sudler Family Professor of Constitutional Law, NYU School of Law).

98 Id. at 202.


100 See, e.g., Clegg & Chavez, supra note 8, at 564, 580–81 (arguing that the lack of an adequate legislative record when combined with the violation of federalism makes Section 5 an
Despite the tone of the NAMUDNO decision, which can easily be described as hostile to Section 5’s constitutionality, it is important to remember that the Supreme Court did not strike down Section 5. Two possible explanations for this have been advanced: first, and most hopeful to supporters of Section 5, is that there simply were not enough votes; and second, that the conservatives on the Supreme Court did not want the inevitable political firestorm that would have resulted had the Court struck down the VRA in what would likely have been a 5-4 decision.\textsuperscript{101} This second explanation has the undeniable ring of politics to it. It means that the future of Section 5 may hang on the unpredictability of the Supreme Court’s tolerance for controversy and the willingness of the individual justices to dismantle “one of the crown jewels of the civil rights movement.”\textsuperscript{102} One thing is certain, the constitutionality of Section 5 under the current Supreme Court is questionable at best.\textsuperscript{103} The following recommendations will bring

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\textsuperscript{102} Fuentes-Rohwer, \textit{supra} note 11, at 130.

\textsuperscript{103} Two cases concerning the constitutionality of Section 5 are making their way through the judicial system and seem bound for the Supreme Court. They are: \textit{Laroque v. Holder}, No. 10-0561, 2010 U.S. Dist. LEXIS 134464, (D.D.C., Dec. 20, 2010) (dismissing the case), and \textit{Shelby...
Section’s scope and application more clearly within the Court’s constitutional limits and thus help save this foundational measure of the Civil Rights movement.

III. **RECOMMENDATIONS**

The United States has made great strides toward equality since the passage of the Voting Rights Act in 1965. Despite this, discrimination still poisons our voting system. While blatant acts of racism have decreased, there are still concerted and consistent efforts to discriminate against minority voters. The coalescence of minorities toward a common political party in some ways transformed discussions of institutionalized discrimination into a less polarized vocabulary. Now, voting discrimination can be more easily included within political motivations and biases. Since case-by-case adjudication of voting discrimination remains inefficient and ineffective, Section 5 is an invaluable weapon in the enforcement of Fifteenth Amendment rights. Any successful reforms must accomplish three things: First, they must reinforce the constitutionality of Section 5; Second, they must increase its effectiveness at preventing voting discrimination; Finally, they must help guard against political abuse in the enforcement of Section 5. These are the goals of the recommendations that follow.

A. **Reforms to the Statutory Structure**

The relatively static structure of Section 5 and its coverage formula means that it is inherently unable to adapt to changes and developments in demographics, motivations, and constitutional interpretation. As has been seen with responsibilities such as environmental protection and food and drug security, the slow-moving and politically shackled arms of Congress are not always a successful means of responding to new contingencies or shifting
circumstances. Additionally, the lack of any real reporting requirement in regard to preclearance decisions, along with the inability to appeal grants of preclearance, increases the chances of political abuse in the system. This leads to two recommended reforms: First, the DOJ should have both rulemaking and adjudicatory power and the freedom to modify both the coverage and the procedures associated with Section 5. Second, there should be greater transparency and accountability of the preclearance process, including requirements that decisions be explained and grants of preclearance be appealable.

1. Power of Rulemaking

The responsibility of updating the coverage formula is tailor-made for an agency. For all the congressional hearings and debates on the coverage formula during the 2006 reauthorization, a change never really stood a chance against the political pressures. This is not to say that the DOJ should be able to completely scrap and replace the old coverage. There is a strong rationale behind the current coverage and it should not be easily dismissed. Congress should thus set the current coverage as the starting point. The DOJ should have the flexibility to enact, through notice-and-comment rulemaking, new procedures and rules, some of which are discussed below. This would allow the Section 5 mechanism to be adapted to new and changing situations, and more easily respond as new ideas and solutions arise.

2. Reporting Requirements and Appeal of Decisions

To confront the potential for political bias within the preclearance decisionmaking process, Congress should create specific reporting requirements for the DOJ and allow limited appeals of grants of preclearance. This would add more transparency and accountability to the system, and would serve as a significant safeguard to ensuring the apolitical basis for preclearance decisions.
The reporting requirement should demand the creation of a record for every preclearance decision. This record would include all the arguments and supporting evidence introduced by the requesting jurisdiction, and would also include any documents, memoranda, or studies created or relied upon by the DOJ. In instances of a denial of preclearance or an explicit grant of preclearance, the record would also need to include an order laying out the evidence relied upon, the conclusions drawn from that evidence, and the reasoning behind the ultimate decision. There are also those situations where the DOJ simply does not respond to a request for preclearance within sixty days, thus effectively granting preclearance. To confront this, any party would be allowed to submit a request to the DOJ demanding a reasoned explanation for a decision at any time up to fourteen days after the expiration of the initial sixty days. The parties could also submit the request at any time during the sixty days. Once a request is submitted, the jurisdiction may not enforce the change for which they are seeking preclearance until the DOJ releases an official decision, complete with all the requirements mentioned above. The requirement for an inclusive record would open the process up to public and political scrutiny. This would create additional pressure to make reasoned decisions based on the law as opposed to political bias. It may result in a heavier workload for the DOJ, but given the importance and lasting effect of preclearance decisions, this is an acceptable price to pay.

The record would also serve a vital role in the appeal process. Currently, a DOJ denial of preclearance is not appealable, but the jurisdiction may subsequently request preclearance, or declaratory judgment, from the District Court for the District of Columbia thus essentially resulting in a new preclearance proceeding.\footnote{28 C.F.R. § 51.11 (2010).} This would not change. The record would serve no inherent role in this process unless the parties chose to use it in their case and even then it

\footnote{28 C.F.R. § 51.11 (2010).}
would be subject to no deference. For appeals of grants of preclearance, which Congress should also require be brought in the District Court for the District of Columbia, there would be a two-tier system of review. For decisions that concern redistricting or explicit preconditions to the right to vote or register to vote, such as ID requirements or good behavior prerequisites, the standard of review would be *de novo*. This standard represents the importance of decisions regarding redistricting and prerequisites to voting as well as their heightened ability to successfully discriminate against minority voters. For appeals of other voting changes, the court would analyze the DOJ’s decision under the *Chevron* doctrine and would overturn only if “arbitrary, capricious, or manifestly contrary to the statute.”105 This deference would help prevent the court from being overloaded with cases by allowing it to dismiss those decisions that are reasonably supported by the record and the law. At the same time, it would help prevent against politically biased preclearance decisions by allowing the court a means of overturning those cases.

**B. Regulatory Reforms to Section 5**

With its new rulemaking power, the DOJ should make two immediate changes. First, it should create a more effective opt-out mechanism. While the case for simply easing the requirements for the entire mechanism is not there,106 there are reasons to make some changes.

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106 *Cf. J. Gerald Herbert, An Assessment of the Bailout Provisions of The Voting Rights Act, in VOTING RIGHTS ACT REAUTHORIZATION OF 2006: PERSPECTIVES ON DEMOCRACY, PARTICIPATION, AND POWER* 257, 270, 275 (Ana Henderson Ed., 2007) (arguing that the current bailout provision is “neither too light nor too onerous” and that it appropriately requires
It is not immediately clear why so few jurisdictions have utilized the current opt-out provision, but it raises serious concerns about its effectiveness. To remedy this, the DOJ would enact a tiered opt-out system with each tier representing different classes of voting changes. This would provide for different evidentiary requirements for different tiers. The requirements would be more relaxed for the tier that includes simple voting changes such as the extension of polling station hours during an election. The current opt-out requirements would remain for the top tier that includes redistricting changes and imposition of explicit prerequisites to registration or voting. This would allow non-discriminating jurisdictions, which may be discouraged by the cost and difficulty of meeting the evidentiary burden of the current opt-out provision, to choose a less onerous opt-out level and gain back some independence over their voting system.

In addition, instead of an opt-opt proceeding beginning in the District Court of the District of Columbia, as it currently is under the VRA, the first step would be formal adjudication within the DOJ. After a jurisdiction exhausted this means of review, it would be able to appeal the DOJ’s decision to District Court for the District of Columbia. This would allow the DOJ some power to adjust the adjudicatory proceeding to minimize any unnecessary costs or burdens on the petitioners, while at the same time the statutory requirements of formal “covered jurisdictions to prove the absence of those conditions that let to Section 5 coverage in the first place).

107 Compare id. at 272 (asserting that the bailout provision is “not too onerous, nor are the costs too high” and that the most likely reason so few jurisdictions have bailed out is that they simply do not know about the process), with Pitts, supra note 99, at 284–85 (charging that the difficulty of the bailout provision is the reason so few jurisdictions have utilized it).
adjudication would still ensure a fair and independent proceeding. The reformed opt-out provision would make clear that any proven acts of voting discrimination would result in a reversion back to complete coverage. This reform strengthens the constitutionality of Section 5 by directly confronting the concern of the Supreme Court that the current provision makes it too difficult for jurisdictions, with no history of discrimination, to opt-out. Further, as more jurisdictions successfully utilize this opt-out provision, it would reduce the preclearance workload on the DOJ, freeing up scarce resources and shifting them to the areas that need them. This would increase the agency’s effectiveness at enforcing the VRA and preventing voting discrimination.

Finally, as its second rulemaking change, the Agency should create a set of criteria and procedures by which jurisdictions may be added to Section 5 coverage. To add a jurisdiction to Section 5 coverage, the DOJ would require clear and convincing evidence showing a consistent pattern of voting discrimination, either intentional, effectual, or both, and a strong likelihood of continuance into the future absent the requirement of preclearance. Formal adjudicatory proceedings to add a jurisdiction to coverage would be initiated by the DOJ, but any individual voter or groups could petition the DOJ to act. Evidence could come from any source including a DOJ initiated investigation. This would greatly increase the effectiveness of Section 5 by ensuring the coverage formula represents, as closely as possible, the areas with the greatest propensity towards discrimination. The requirement that proceedings be conducted through formal adjudication would ensure that decisions are made by impartial Administrative Law Judges and that parties have an ample opportunity to be heard and to cross-examine adverse witnesses. This reform would also strengthen Section 5’s constitutionality by allowing coverage
to be extended to where the discrimination is and, when combined with a reformed opt-out provision, also ensuring that coverage more accurately represents the current state of the country.

**CONCLUSION**

Section 5 has been an extremely successful tool in the fight against voting discrimination. It has helped produce remarkable increases in minority voter registration and minority representation at all levels of government. The right to vote, the ark of our safety, is more secure today because of this important provision. Despite this, voting discrimination still persists and the need for protection remains. Section 5 must be reformed both to increase its effectiveness in a new, ever-changing society, and to ensure that it remains a constitutional assertion of congressional power. The apolitical goal of voting equality must guide this debate as well as inspire those in power to tackle this issue now.